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The "War on Terror" and the "War of Terror": Nomadic Multitudes, Aggressive Incumbents, and the "New" International Law: Prefatory Remarks on Two "Wars"

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Abstract

This article contrasts and compares the war on terror and the war of terror in the wake of, and before, 11 September 2001. The philosophical underpinnings involved in defining "terrorism" are analyzed in the context of the United States' war on terrorism and related wars of terrorism, such as the 1998 World Islamic Council's fatwa. Both wars fall within the wording of recent United Nations' Resolutions that address the adverse impact of terrorism on Human Rights. The understanding of the meaning of "terrorism" by those promoting the war on terrorism provides a powerful political tool, notwithstanding effects on Human Rights that are similar to the effects that result from the war of terrorism. These two wars signify a patterned break from the classical comity between nation-states with respect to acts of aggression, and the values being promoted in this context serve the emerging American Empire and the resistance to it. The result, framed by those promoting the war on terrorism, is that-either being for or against terrorism-potential for non-violent solutions are lessened. Since September 11, the war on terror has installed a new rule of preemptive self-defence, grounded in suspicion, and with no recent precedent in international law.

Keywords

International law; Terrorism--Prevention--Law and legislation; Self-defense (International law); War on Terrorism, 2001-2009

THE “WAR ON TERROR” AND THE “WAR *OF* TERROR”: NOMADIC MULTITUDES, AGGRESSIVE INCUMBENTS, AND THE “NEW” INTERNATIONAL LAW

PREFATORY REMARKS ON TWO “WARS”[©]

BY UPENDRA BAXI*

This article contrasts and compares the war *on* terror and the war *of* terror in the wake of, and before, 11 September 2001. The philosophical underpinnings involved in defining “terrorism” are analyzed in the context of the United States’ war on terrorism and related wars of terrorism, such as the 1998 World Islamic Council’s fatwa. Both wars fall within the wording of recent United Nations’ Resolutions that address the adverse impact of terrorism on Human Rights. The understanding of the meaning of “terrorism” by those promoting the war on terrorism provides a powerful political tool, notwithstanding effects on Human Rights that are similar to the effects that result from the war of terrorism. These two wars signify a patterned break from the classical comity between nation-states with respect to acts of aggression, and the values being promoted in this context serve the emerging American Empire and the resistance to it. The result, framed by those promoting the war on terrorism, is that—either being for or against terrorism—potential for non-violent solutions are lessened. Since September 11, the war on terror has installed a new rule of preemptive self-defence, grounded in suspicion, and with no recent precedent in international law.

Cet article met en contraste et compare la guerre *contre* le terrorisme et la guerre *du* terrorisme à la suite du 11 septembre et avant. Les fondements philosophiques qu’implique la définition du « terrorisme » sont analysés dans le contexte de la guerre américaine contre le terrorisme, puis reliés aux guerres du terrorisme, comme la fatwa du Conseil du monde islamique de 1998. Les deux guerres s’inscrivent dans la définition des récentes résolutions de l’ONU, lesquelles traitent de l’effet nuisible que le terrorisme exerce sur les droits de la personne. Comprendre la signification du « terrorisme » permettra à ceux qui préconisent la guerre contre le terrorisme de disposer d’un outil politique puissant, même si les effets sur les droits de la personne sont semblables aux effets découlant de la guerre du terrorisme. Ces deux guerres dénotent l’effondrement méthodique de la communion classique entre États nations en matière d’actes d’agression. Les valeurs érigées dans ce contexte servent l’Empire Américain naissant et la résistance à son encontre. Le résultat, formulé par ceux qui mettent en avant la guerre contre le terrorisme, est que - étant soit pour, soit contre le terrorisme - la possibilité de solutions non-violentes est amoindrie. Depuis le 11 septembre, la guerre contre le terrorisme a instauré une nouvelle règle d’autodéfense préventive, fondée sur le soupçon, règle sans aucun précédent récent dans le droit international.

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The onset of the twenty first century is marked by an inaugural era of the "war *on* terror" and "war *of* terror." The "war *on* terror" has already assumed fierce form as a term of art; for that and related reasons, I here innovate its other, namely the "war *of* terror." The "war *on* terror" makes sense only within the contexts provided by the "war *of* terror." In itself, neither "war" nor "terror" constitutes any new phenomenon. This conjunction, the doubling, the now endless mirror imaging, this rather voracious *doublement fonctionale* remains violently inaugural; never before September 11, 2001 ("9/11"), were acts of "terror" described in terms of a "war," nor were the practices of counter-"terror."¹

I here use the expression "war *of* terror" to signify both the collective intent and capability of non-state actors and networks to deliver, organize, and implement the threat or use of force directed preeminently against civilian populace and sites across the world. The intent consists in declaring "war" and waging international hostilities against sovereign incumbents in the world order; the capability consists in harnessing some extraordinary material resources (such as money and armament) and non-material resources (such as professional competence and skills in the preparation for, and organization of, "efficient" recourse to violence,

¹ Because the categories "terror," "terrorism," and the "wars" *on* and *of* "terror" remain shot through with constitutive ambiguities, they ought to be always placed within quotation marks. I apologize to the editors and readers for this stylistic inelegance. Any essentialist (or reductionist) understanding stands at the outset forbidden by long, even ancient, histories. See e.g. Walter Laqueur, *Terrorism* (Boston: Little, Brown & Company, 1977) [Laqueur, *Terrorism*].

cultivating motivation for its self-annihilating practices, and overall commitment to a professed just cause). While the ensemble of violent capabilities remains cruelly on display in each act of this "war," the intent remains difficult to decipher because the agents and managers of this "war" do not form territorially based coherent groups or collectivities, and because their "practical reason" remains diversely articulated in ways that resist acts of ideological reading.²

The kindred expression "war *on* terror" remains co-equally intelligible only in terms of some anticipated/posited/already posted/imagined futures of human history. Enactments of the "war *on* terror" stand super-justified in terms of the protection and promotion of human rights and fundamental freedoms, the international or global rule of law, and, most comprehensively, as a worldwide installation of market-friendly democracy and freedom. Shortly put, this war *on* terror remains by definition a "just war," raising the question only of how far the nomenclature may retard its efficient pursuit.³ An ideological peculiarity of this war is that it instantly de-focuses antecedent or ongoing forms of state and international "terrorism."⁴

This war mobilizes an infinite potential for counter-terror response by the coalitions of willing states against nomadic insurgents and states that supposedly or allegedly harbour them. In this "war" the latter forfeit their status as co-equal sovereign formations instantly upon the fabrication of their status as "rogue," "outlaw," or "failed" states, which, by acts of omission and commission, are labeled as complicit with the "war *of* terror." Their consent as co-equal sovereign states (as hitherto understood in international law discourse) remains irrelevant to acts of "war *on* terror," in hot pursuit of "terrorists" within otherwise secure territorial boundaries. This war, being conducted recently in the name of the coalitions of the willing states, claims to serve the spirit of the UN *Charter*, even when

² Many analyses of the "war" rightly conclude that it is misleading to see in it any inherently simple-minded Huntington-type "clash of civilizations" ideology. By the same token, it is not always understandable in terms of resistance to neoliberalism and globalization. See e.g. George Leaman, "Iraq, American Empire, and the War on Terrorism" (2004) 35 *Metaphilosophy* 234. Ulrich Beck maintains that the "outbreak of global terror amounts to a Chernobyl of globalization." See Ulrich Beck, "The Silence of Words: On Terror and War" (2003) 34 *Security Dialogue* 255 at 262. This metaphor remains both heavily epidemiological and accidental. In contrast, Charles Tilly insightfully urges cautious grounded understanding in his article, "Terror, Terrorism, Terrorists" (2004) 22 *Sociological Theory* 5.

³ Thus, for example, Giles Andréani rather gallantly provides six reasons for moderating the languages of "war *on* terror." See Giles Andréani, "The 'War on Terror': Good Cause, Wrong Concept" (2004) 46 *Survival* 31.

⁴ See Noam Chomsky, "Who Are the Global Terrorists?" in Ken Booth & Tim Dunne, eds., *Worlds in Collision: Terror and the Future of Global Order* (New York: Palgrave Macmillan, 2002) 128.

fulsomely acting its letter. By definition, the accompanying justificatory regimes of “preemptive war” and “regime change” stand directed against the nations and peoples of the Third World because the Euroamerican or the triadic state (the United States, the European Union, and Japan) formations remain, with overwhelming and even manifest dubiousness, obviously beyond the discourse of “failed states.” Thus, the violence of the inaugural wars *on* and *of* terror consists in their globally constituted character. This article offers some preliminary approaches to the understanding of these two heavily proclaimed “wars,” their impacts on the future of human rights (as we knew them), and the making/remaking of yet another fiercely proclaimed and professed “new” international law and orderings.

I. “TERROR”/“TERRORISM”: PHILOSOPHIC UNDERSTANDINGS AND PRACTICAL TASKS

Although rather sparse, philosophical writing concerning the two wars has some considerable pertinence to lawyerly and policy tasks. It remains concerned both with the problem of definitional understanding of “terror” and “terrorism” and the construction and critique of justifications for recourse to terror.

The genealogies and chronologies of these two contemporary wars infinitely complicate understanding of the violent post-9/11 world disordering. Protagonists of both the wars maintain that theirs is a response to prior situations or histories of “terrorism.” It is not easy, even as a matter of simple chronology, to say which one comes first. The salient agents of the “war *of* terror” offer assorted reasons/justifications for this war as a response to an underlying war of “terror,” even a series of these. They seem to justify their actions as a response to the recent but still ancient (this awkward phrasing illustrates the complexity of periodization) wrongs unleashed by the previous histories of wars *of* terror. In contrast, the protagonists of the “war *on* terror” regard theirs as a “second war,” which may not have happened at all without the first (that is, the “war *of* terror”). The second war, it is loudly said, occurs because the first severely threatens the futures of a global capitalist driven new-human, even post-human, civilization.⁵ The second war has no use for any scrupulous regard for the causes that underscore the first war. By the common consent of “civilized nations” (that is, the newly progressive Eurocentric state formation manifest through the “coalitions of willing states”) the existing body of

⁵ Concerning the latter, see Francis Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (London: Profile Books, 2002).

normative legal restraints concerning the use of force do not, as we see later, apply; in their place some newly fangled doctrines of "pre-emptive" war and "regime change" now stand uneasily installed. This second war has scant regard for its own, otherwise endlessly proclaimed, Euroamerican "gift" of human rights with respect to the benighted "failed states," exemplars of what Gayatri Spivak now troublesomely labels "failed decolonization."⁶

How may philosophical thinking or method help clarify the contending beliefs and performances? To start with, one may describe the situation as posing the problem of causality in a way that enables some preliminary means of describing causes and effects. The old Aristotelian categories of causality may suggest to us the distinction between proximate cause and efficient or final cause. In that case, one may say that 9/11 constituted the proximate cause of the "war *on* terror" just as the efficient cause is provided, for the protagonists of the "war *of* terror," by the past histories of "terror." But this language does not altogether avoid a "linear, deterministic, and nondialectical logic of causality," which assumes causes as originally given; following a Hegelian dialectical understanding, Angelica Nuzzo recently concludes that

Terrorism (as well as its symbol, 9/11) is ... the *true effect* or the *real consequence* of the war against terrorism that the United States has been waging for decades in numerous parts of the world. In other words, war is the true cause of that which it declares it is fighting—namely, terrorism.⁷

Put another way, "dialectic shows that terrorism is an effect, not a cause," with the consequence that "politics aimed at opposing" the war on terror will "have to look to reasons that lead to the exercise of violence and will have to fight the effect along with the causes that produce it."⁸ Nuzzo suggests that a dialectical understanding remains "essential if we want to reach a nonideological and noninstrumental definition of terrorism" and

⁶ Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge: Harvard University Press, 1999). But see Ruth Gordon, "Saving Failed States: Sometimes a Neocolonial Notion" (1997) 12 *Am. U. J. Int'l L. & Pol'y* 903. At least, in this regard, the campaign strategies of George W. Bush and John Kerry present a remarkable verisimilitude. The Kerry campaign faulted the Bush regime for being inefficient and diversionary in terms of capture and annihilation of Osama bin Laden and Al-Qaeda "terrorists."

⁷ "Reasons for Conflict: Political Implications of a Definition of Terrorism" (2004) 35 *Metaphilosophy* 330 at 336. I do not, for reasons of space, here elaborate the difficult slippage from "causes" to "reasons" in this analysis; nor may I here seek to unravel the complexity of the phrase "the war against terrorism that the United States has been waging for decades in numerous parts of the world."

⁸ *Ibid.* at 339.

if we want to “regain the historical—and oppose the fictional—sense of the reality in which we live.”⁹ In this sense, the struggle consists in providing “definitions” that at least speak to aspects of historical and structural domination and denial of human rights and justice perpetuated by the United States as well as the Soviet Union (and their allies) in the twentieth century, and by the colonial and imperialistic Eurocentric global hegemons in the three centuries preceding the current waging of the “war on terror.”

On the other hand, philosopher Alain Badiou recently offered the insight that the word “terrorist,” and the adjective “terrorism,” has “no neutral readability,” precisely because it “dispenses with a reasoned examination of political situations, of their causes and consequences.”¹⁰ International lawpersons who have struggled over many generations to fashion approaches towards an acceptable normative description of “terrorism” may find this insight congenial.¹¹ However, they know as well as the philosophers the difficulties that attend “reasoned examination of political situations”; there remain at hand many diverse reasoned analyses that frame very different understanding of the causes and consequences of “terrorism.” They may, however, feel perplexed by Alain Badiou’s accentuation of “reasoned examination,” on the one hand, and his further analysis, on the other, of the ways in which the “crime of New York and the following battles” constitute the “*disjunctive synthesis of two nihilisms*.”¹² The overall result of both the “wars” then, for Badiou, remains a register constituted by the “bloody and nihilistic games of power without purpose and without truth.”¹³ If so, understanding “terror” in ways that destruct “the circuits of nihilism”¹⁴ constitutes a new task for philosophers, international lawpersons, and human rights activism.

The task is formidable because the two “wars” may not be read

⁹ *Ibid.* at 337.

¹⁰ *Infinite Thought: Truth and the Return to Philosophy* (London: Continuum Books, 2003) at 145. Badiou’s indictment of the word “terrorism” as a propagandistic term has been echoed in recent literature. Tomis Kapitan, for example, suggests that “‘terrorism’ is simply the current vogue for discrediting one’s opponents before the risky business of inquiry into their complaints can even begin. If individuals and groups are portrayed as irrational, barbaric, and beyond the pale of negotiation and compromise, then asking why they resort to terrorism is viewed as pointless, needlessly accommodating, or, at best, mere pathological curiosity.” See Tomis Kapitan, “The Terrorism of Terrorism” in James P. Sterba, ed., *Terrorism and International Justice* (New York: Oxford University Press, 2003) 47 at 52.

¹¹ See the discussion by Susan Tiefenbrun, “A Semiotic Approach to a Legal Definition of Terrorism” (2003) 9 *ILSA J. Int’l & Comp. L.* 357.

¹² *Supra* note 10 at 158 [Emphasis in original].

¹³ *Ibid.* at 160.

¹⁴ *Ibid.* at 162.

wholly as an affair of rational desire; political passion and religious sentiment also enter the production of incumbent and insurgent politics. Neither the causes nor the "terror"/"terrorism" itself may be ever thus fully understood within "the critical obsession, and the narrow form of judgement" of the Enlightenment rationality paradigms.¹⁵ Because of this, international lawpersons and activists need to resituate their duty with Badiou, and alongside philosophers, "to rationally reconstitute the reserve of the affirmative infinity that every liberating project requires."¹⁶

Lest this may seem too formidable an invite for some of us, allow me to cite the fulfilment of more than a century of activist politics of hope—culminating in the institutionalization of the International Criminal Court or, in a related but distinct context, the emergence of a feminist paradigm of human rights—as testifying to the praxes of liberational recourse to modes of "affirmative infinity." This demonstrates the truth of the Badiou maxim: "one single thought has an immensity far beyond any judgement."¹⁷ The sovereign question both for law and philosophy is then, perhaps: What may constitute this immensity of thought in the ongoing war *on* and *of* terror?

For Badiou, philosophy perhaps offers the beginning of an approach to a "right" answer: "Philosophy," he writes, "exists solely insofar as it extracts concepts from a historical pressure which would grant them nothing other than a relative sense."¹⁸ International lawpersons may perhaps aid philosophy in this task, but their own craft remains better suited to providing an understanding of this "historic pressure" and "relative sense" of strategic concepts imbricated by the politics of dominance and of resistance. Put another way, they are apt to relate "terror"/"terrorism" in terms of the related concepts already made available by processes of historic pressures—conceptions such as "human rights," "global governance," "international rule of law," and "global justice"¹⁹—no matter how these may stand misappropriated in the discourse concerning the two "wars." In contrast, both international lawyers and philosophers also need to more fully understand from historians of

¹⁵ *Ibid.* at 163.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.* at 130.

¹⁹ Already, the discourse stands framed in terms of "international ethics" and "international justice." As to the former (though not directly addressed to the problematic of terror), see Charles R. Beitz *et al.*, eds., *International Ethics* (Princeton: Princeton University Press, 1985). As to the latter, see Sterba, *supra* note 10.

terrorism that the quest for causes may indeed be futile.²⁰

The question of justification for either form of war remains intractable. As concerns the use of force by state entities, deliberation and reflexive reason has focussed on the thematic of just war in all its three moments: *jus ad bello*, *jus in bello*, and *jus post bellum*. The war on terror has been, as we see later, subjected to strict scrutiny in terms of the “justice” of ends and means in Afghanistan and Iraq. For the moment, I wish to illustrate the extraordinary complexity and contradiction ushered in by the two wars in terms of justification by juxtaposing two extraordinary articulations. The first stands furnished by a contemporary but pre-9/11 text, provided by the 1998 World Islamic Council’s *fatwa* (of which Osama bin Laden was a co-author) that urges all Muslims

to kill the Americans and their allies—civilians and military ... in any country in which it is possible to do it, in order to liberate the al-Asqa Mosque [in Jerusalem] and the Holy Mosque [in Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. ... We—with God’s help—call on every Muslim who believes in God and wishes to be rewarded to comply with God’s order to kill the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid on Satan’s U.S. troops and the devil’s supporters allying with them, and to displace those who are behind them so that they may learn a lesson.²¹

Political philosopher Jean Bethke Elshtain furnishes the second text:

As the world’s superpower, America bears the responsibility to help guarantee ... international stability, whether much of the world wants it or not. This does not mean that

²⁰ Thus, Walter Laqueur has shown by scrupulous research in the histories of “terrorism” that neither exploitation, nor impoverishment, nor class subjugation (among other factors) causally correlate with occurrence of “terrorist” acts and performances. See Laqueur, *Terrorism*, *supra* note 1. Indeed, Laqueur finds that “terrorism, however justified the grievances of its proponents, has under no circumstances succeeded against effective dictatorship; it has not managed to weaken it, modify its policies or affect its course of action in any way. If terrorism has had any success at all, it has been against democratic governments and ineffective, meaning obsolete or halfhearted, dictatorships” (*ibid.* at 147). This observation may only hold if the success of many an anticolonial struggle with components of “terrorism” is read only within the context of “obsolete” or “halfhearted” dictatorships. Nor does this observation help any full understanding of the “terrorist” performances under the circumstance of postcoloniality. Space forbids any elaboration of this contention, but for a more detailed historically specific narrative see Yezid Sayigh, *Armed Struggle and the Search for State: The Palestinian National Movement, 1949-1993* (Oxford: Oxford University Press, 1997).

²¹ Yossef Bodansky, *Bin Laden: The Man Who Declared War on America* (Roseville, Cal.: Prima, 2001) at 226-27. See also J.M.B. Porter, “Osama Bin-Laden, Jihād, and Sources of International Terrorism” (2003) 13 Ind. Int’l & Comp. L. Rev. 871; Jane Corbin, *The Base: In Search of Al-Qaeda—The Terror Network That Shook the World* (New York: Simon & Schuster, 2002). See further the insightful analysis by Bernard K. Freamon, “Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History” (2003) 27 Fordham Int’l L.J. 299.

we can or should rush around imposing "solutions" everywhere. It does mean that we are obliged to evaluate all cries for justice and relief from people who are being preyed upon, whether by nonstate marauders (like terrorists) or by state-sponsored enforcers. We, the powerful, must respond to attacks against persons who cannot defend themselves because they, like us, are human beings, hence equal in regard to us, and because they, like us, are members of states, or would-be states, whose primary obligation is to protect the lives of those who inhabit their polities.²²

Space forbids a detailed exegesis of both these texts, which offer an ethic of justification for recourse to terror wars. The first text, lacking (at least in my considered view) any authoritative grounding in the *shari'a* tradition, offers dubious constructions of sacred cosmic duty addressed to each pious Muslim individual²³; at best, it furnishes a clue to some understanding of historic grievances. The text is, after all, geared to a violent struggle to reverse some monumental wrongs, and practice of violence or "terror" is legitimated only by pedagogy ("so that they may learn a lesson"). The second text offers a secular justification addressed primarily to the foreign policy of the surviving superpower. If in the first text, the violently constituted subaltern peoples carry the burden of fulfilling a sacred duty to conduct highly individualized "war of terror," the second text redefines a new *jus cosmopoliticum* for a new *Pax Americana*. The authority for the second text comes from the notion that imperial power creates an arc of global responsibility for all suffering and rightless human beings and communities. As a superpower, the United States thus bears the highest moral responsibility to protect the weak, assist the defenceless, and vanquish wicked and tyrannical state and non-state "enforcers." Both the texts, though differently, "justify" aggression and violence as means of last recourse. But whereas the first text speaks of the duty of each pious individual, the second results in an Elshtain-type claim that all persons everywhere in this wide world may make an "equal claim ... to having coercive force deployed in their behalf if they are victims of one of the many horrors attendant upon radical political instability."²⁴ At issue, all over again, remains the cause/effect question: What if these

²² Jean Bethke Elshtain, *Just War Against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2003) at 169-70. One may scarcely fail to note the close and uncanny family resemblance between this text and the inauguration speech marking the second installation of President George Walker Bush. See The White House, News Release, "President Sworn-In to Second Term" (20 January 2005) online: The White House <<http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html>>.

²³ See the insightful analysis by Freamon, *supra* note 21. See also Abdullahi Ahmed An-Na'im, "Upholding International Legality Against Islamic and American Jihad" in Booth & Dunne, *supra* note 4, 162. In a different vein, see Zayn Kassam, "Can a Muslim Be a Terrorist?" in Sterba, *supra* note 10, 114.

²⁴ Elshtain, *supra* note 22 at 168.

“horrors” are indeed produced by the very Good Samaritan global hegemon that now further stands attributed with large, devious, delirious, delusionary, overwhelming, globally pernicious, and even historically impossible ethical “burdens” to cure the accursed state of affairs?

II. “TERROR” AND HUMAN RIGHTS

A vexed question raised by proponents of both the “wars” is how international lawyers and lawpersons may make sense of the relationship between “terror” and human rights. Is deliberate infliction of indiscriminate violence by insurgent non-state actors against civilian populations and sites ever justified as a means of restoring their own human rights estates, and making these somehow secure for the contingent future?²⁵ This important question has not been fully addressed by either philosophers or international lawpersons.

Analytically, at least three strategies remain available for a consideration of this question. The first suggests the need to distinguish the perspectives of the agents of such violent recourse from those who are directly or indirectly harmed and hurt by them. Even when the perpetrator-oriented perspective suggests scenarios of long-term overall collective enhancement of human rights (that is, the promotion, protection, enjoyment, and realization of human rights), terrorist violence remains simply unjustifiable from the victim-oriented perspective.²⁶ The same result follows a second strategy, named as “ethical peace,” which insists in principle that human rights as a whole ought not be advanced by recourse to collective political violence, especially through forms of “terrorism.”²⁷ This otherwise laudable approach discounts (perhaps on some sort of Humean view, which insists that moral “ought” may never flow from an

²⁵ Of course, the issue of collateral damage is as vexed as the necessary distinctions between combatants and non-combatants, and deliberateness and internationality. See Shannon B. French, “Murderers, Not Warriors: The Moral Distinction Between Terrorists and Legitimate Fighters in Asymmetric Conflicts” in Sterba, *supra* note 10, 1. Leon Trotsky’s defence of Red Terror, contesting such distinctions, has been subjected to a searching criticism. See Igor Primoratz, “The Morality of Terrorism” (1997) 14 J. Applied Phil. 221 at 225-28.

²⁶ See Primoratz, *ibid.* at 230.

²⁷ See Anthony Burke, “Just War or Ethical Peace: Moral Discourse of Strategic Violence” (2004) 80 Int’l Aff. 329. This approach rejects the just war paradigm of “prima facie acceptance of the legitimacy of strategic violence,” instead, “making peace—however complex, difficult and delayed—its central normative goal” (*ibid.* at 349). It “assumes that if the short- to medium-term existence of strategic violence is to be accepted, it must only be *conditional*, and used only under conditions far more stringent, enforceable and morally consistent than have so far been provided by either just war theory or international law” (*ibid.* at 350). I may note here parenthetically that the theory and practice of Mohandas Gandhi remains crucially relevant to further development of the theory of ethical peace.

existential or empirical "is") the considerable historical jurisgenerative evidence establishing the fact that the practices of the collective often furnish the very matrix for human rights generation.²⁸ The third strategy, which I attend to here in some detail, urges that context-sensitive distinctions ought to guide our reflexive labours.

Context-sensitive narratives pose issues of justification for "terrorist" violence in terms of possible distinctions between justifications for within-nation insurgent violence and its across-nations "global" practices. Some within-nation "terrorist" recourse may be held justifiable in terms of what Allen Buchanan calls the problematic morality of secession,²⁹ as well as in the related contexts of de-colonization movements.³⁰ Many of us may share or develop justifications for "terrorism," were it historically possible, in contexts such as "genocidal" or "ethnic cleansing" state formations. Likewise, we may want to share or develop justifications for insurgent "terrorism" in situations such as the (happily) erstwhile apartheid South African state formation. However, any extension of such justifications in across-nations acts of "terrorist" violence remains fraught with difficulties already illustrated by the *fatwa* instanced in the preceding section. The injustices of globalized racism are, of course, real (as experienced by their victims or, more often, by their next of kin). Yet, these scarcely offer self-evident and ethically decisive justifications for recourse to mass international "terrorism."³¹

Virginia Held remains a foremost exemplar amongst a few philosophers who resolutely engage moral justifications of within-nation insurgent "terrorist" recourse. She concedes that such recourse indeed violates the human rights of those caught within the crossfire of its practices, but advocates a severely limited justification based on a distinct

²⁸ I have attempted, however, to suggest precisely this. See Upendra Baxi, "The Right to Be, and to Remain, Human" in Upendra Baxi, Geeti Sen & Jeanette Fernandes, eds., *The Right to Be Human* (New Delhi, Lancer International for Indian International Centre, 1987), reprinted in Upendra Baxi, *Inhuman Wrongs and Human Rights: Unconventional Essays* (New Delhi: Har-Anand, 1994) at 1-18.

²⁹ *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colo.: Westview Press, 1991).

³⁰ See generally Robert J.C. Young, *Postcolonialism: An Historical Introduction* (Malden, Mass.: Blackwell, 2001); David Macey, *Frantz Fanon: A Life* (London: Granta, 2000).

³¹ Starkly put, those who advocate recourse to insurgent measures of "terrorism" against institutionalized racism or genocidal trends in global governance formations do not marshal any instant justification in their recourse to the 9/11 type performances. Even the most radical human rights activist formations do not go so far as to "justify" violent insurgent global terrorist recourse against sites of international financial institutions or the *siege social* of transnational corporations. To take another illustrative domain, eco-warriors that combat eco-fiends in confronting contemporary "eco-terrorism" or militant or "extremist" animal rights movements enduringly face many a justificatory difficulty.

logic of distributive justice. Her argument is too complex to be neatly summarized, but overall (and in a “phrase regime” that she may not, after all, endorse) it amounts to this: a limited recourse to “terrorism” remains justifiable when *transitionally* directed to forms of violent dispossession of the “haves” in a nation-society by the human rights “have-nots.” In its ostensible respect for human rights of everyone it, at the same time, causes and constructs legitimation of cascading forms of vast human rightlessness. This justification is grounded on the insight that: “If we must have rights violations, a more equitable distribution of such violations is better than a less equitable distribution.”³² Within-nation insurgent collective political violence thus passes the initial justificatory threshold. The question remains whether this passage holds equally true of a further movement of justification for acts and performances of mass international/global “terrorism.”

A move from a high ethical discursive platform to the messy production of the United Nations orchestrated denunciation of terrorism remains here necessary. A General Assembly resolution in 2000 (which occurred in close proximity of the preparations and performances of the Golden Jubilee of the *Universal Declaration of Human Rights*), expressing serious concern with “the gross violations of human rights perpetrated by terrorist groups,” insists that “acts of terrorism in all its forms and manifestations” are “aimed at the destruction of human rights” and at a creation of “an environment that destroys the right of people to live in freedom from fear.”³³ It also reaffirms that “all measures to counter

³² Virginia Held, “Terrorism, Rights, and Political Goals” in R.G. Frey & Christopher W. Morris, eds., *Violence, Terrorism, and Justice* (Cambridge: Cambridge University Press, 1991) 59 at 80. One must also fully attend to the rather remarkably detailed analysis in Mervyn Frost, *Ethics in International Relations: A Constitutive Theory* (Cambridge: Cambridge University Press, 1996). Straddling rather uncomfortably, but understandably, both within-nation and cross-border “terrorism” as “unconventional violence,” Frost suggests the possibility of justification for such acts of violence “when it is possible to interpret them as acts of communication from those who have been unjustly treated aimed at those who have systematically denied the people in question the opportunity of having their case heard” (*ibid.* at 213). In particular, even including indiscriminate acts of “terrorist” violence, “such extreme acts of communication” remain “justifiable when they are of such a nature that they demonstrate an ongoing commitment to the corpus of settled norms by which they judge that an injustice has been done them” (*ibid.*). Frost wrote before the happenings of the two terror wars, which, in my opinion (which I may not elaborate here because of space constraints), altogether shatter his principal constitutive “background theory” assumptions and the corpus of “settled norms” that he offers. Because I may be erroneous in my critique, I here invite some Frost-friendly anxious revisitation of his “constitutive theory” of ethics in international relations.

³³ See *Human Rights and Terrorism*, GA Res. 54/164, UN GAOR, 54th Sess., Agenda Item 116(b), UN Doc. A/ Res/54/164 (2000). I do not here attend to a similar logic animating the Security Council Resolutions. Concerning such resolutions see Bardo Fassbender, “The UN Security Council and Terrorism” in Andrea Bianchi, ed., *Enforcing International Law Norms Against Terrorism* (Portland:

terrorism must be in strict conformity with the relevant provisions of international law including international human rights standards."³⁴ The subsequent 2002 resolution of the Sub-Commission on Human Rights articulates a conviction that "terrorism" can "never be justified in any instance, including as a means to promote and protect human rights."³⁵ This denunciation expediently ignores the necessary distinctions between within-nation indiscriminate violence targeting non-complicit civilians, justified by "terrorists" as "propaganda by deed,"³⁶ and enduring state terrorism that inveterately seeks to justify its standardless use of force against "terrorists" (and their kins, the "insurgents") as an aspect of the pursuit of the common good of collective human security. The "heroes" and "villains" of both the "wars" still vociferously justify their aggression, and even brutality, by the "justice" of their own cause. But the insinuation of human rights normativity in the very discourse on "terrorism" does indeed problematize the violent hegemonies constructed to aid and assist standardless use of force on either side.

Accordingly, the softest dimension—the preambulatory recital—of the "soft" law of the above cited Sub-Commission on Human Rights resolution deserves a full quotation. The Sub-Commission proceeds with the following recitals:

Regretting that the negative impact of terrorism, in all its dimensions, on human rights continues to remain alarming despite national and international efforts to combat it,

Convinced that terrorism, in all its forms and manifestations, wherever and by whomever committed, can never be justified in any instance, including as a means to promote and protect human rights,

Bearing in mind that the most essential and basic human right is the right to life,

Bearing in mind also that terrorism creates an environment that destroys the freedom from fear of the people,

Convinced that terrorism in many cases poses a severe challenge to democracy, civil society and the rule of law, ...³⁷

Hart, 2004) 83.

³⁴ *Ibid.*

³⁵ *Terrorism and human rights*, ESC Res. 37, 54th Sess., UN Doc. E/CN.4/SUB.2/RES/2002/24 (2002).

³⁶ See Laqueur, *Terrorism*, *supra* note 1 at 71-77 for a revisitation of Bhagat Singh's tract, "The Philosophy of the Bomb."

³⁷ *Supra* note 35.

The first preambulatory recital, by its reference to the negative aspects of “terrorism,” may suggest a reverse potential for its positive aspects. But the second preambulatory recital discredits “terrorism” (here the use of insurgent collective political violence) “as a means to promote and protect human rights.” The fifth recital christens it as a “severe challenge to democracy, civil society and the rule of law.” The sixth, and last, recital assails all purported justifications of “terrorism” as creating a sustained “environment that destroys the freedom from fear of the people.” However, a reading of the term “terrorism” that is also inclusive of state terrorism (regardless of any collective authorial intent and even the contextuality of the enunciation) would also problematize, if not destroy, all basis of justification for some inhumane measures of counter-terrorism, made poignantly familiar by Guantanamo and Abu Ghraib.³⁸ Note that the General Assembly Resolution addresses “the negative impact of terrorism, in all its dimensions, on human rights” as well as “terrorism, in all its forms and manifestations, wherever and by whomever committed.” Counter-terrorism measures and policies certainly fall within this description, as do state “terrorist” acts. Extra-judicial executions of suspected “terrorists,” indefinite preventive detention, custodial torture, degrading or inhuman treatment, secret trials, and similar horrors thus also pose a “severe challenge to democracy, civil society and the rule of law” and enhance the “environment that destroys the freedom from fear of the people.” Any privileged reading the Sub-Commission Resolution thus fosters logics of a hermeneutic of suspicion as well as, hopefully, a hermeneutic of retrieval.³⁹

III. THE MOVEMENT FROM STATE “TERROR” TO THE CRIMINALIZATION OF NON-STATE “TERROR”

We may note at the outset the fact that what marks the post-9/11 movement from combatting the crime of “terrorism” to the “war on terror” are not so much the ideological assemblages (in their protean Deleuze-

³⁸ See the interesting analysis in Kim Lane Scheppele, “All the Clauses, but One: An Analysis of the Government Legal Opinions for Conducting the War on Terrorism” (Paper presented to the Penn. Law Conference on Homeland Security & Civil Liberties, June 2004) [unpublished]. See also Silvia Borelli, “The Treatment of Terrorist Suspects Captured Aboard: Human Rights and Humanitarian Law” in Bianchi, *supra* note 33, 39.

³⁹ For the evocation of these terms in the context of reflexive modernization see Scott Lash, “Reflexivity and its Doubles: Structure, Aesthetics, Community” in Ulrich Beck, Anthony Giddens & Scott Lash, eds., *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Stanford, Cal.: Stanford University Press, 1994) 110.

Guattari senses⁴⁰), but the cultivated politics of fear, and even dread, of access by nomadic multitudes to the weaponry of mass destruction, hitherto (and still) considered legitimate and safe only with the five global aggressive incumbents—the Permanent Members of the Security Council. The war on terror is now based on this dread, this cultivated paranoia of potential acquisition of “weapons of mass destruction” by agents and forces of the non-“liberal” societies (both incumbents and insurgents).

Walter Laqueur now articulates the “war of terror” in terms of “the emergence of new kinds of terrorist violence, some based on ecological and quasireligious concerns, others basically criminal in character, and still others mixtures of these and other influences,” animated by “all kinds of religious-sectarian-nationalist convictions ... taking on a millenarian and apocalyptic tone.”⁴¹ The former director of the CIA, R. James Woosley, in providing the front cover blurb to the paperback edition of Laqueur’s book (“If you read only one book on terrorism, this should be it”), obviously altogether missed the fine print that insists that “most terrorist groups ... probably will not” use “weapons of mass destruction” with “incalculable,” and possibly “devastating” consequences.⁴² The probability that the insurgents may have capabilities and intentionalities to deploy the weaponry of mass destruction (conventional, biological, chemical, and nuclear weapons) against the aggressive global incumbents constitutes the founding myth of the “war on terror.” Like all myths it provides a new powerful political language (Roland Barthes, quite sometime ago, reminded us of this function of the “modern” myth⁴³) that forever serves the strategic interests of the state that, always in struggle with its own nomadic “war machine,”⁴⁴ now stands equally confronted with the nomadic

⁴⁰ See generally Gilles Deleuze & Félix Guattari, *A Thousand Plateaus: Capitalism & Schizophrenia*, trans. by Brian Massumi (Minneapolis: University of Minnesota Press, 1987). “Assemblages,” they insist, “are passionate, they are compositions of desire. Desire has nothing to do with a natural or spontaneous determination; there is no desire but assembling, assembled, desire” (*ibid.* at 399).

⁴¹ *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (New York: Oxford University Press, 1999) at 4-5. These telltale neologisms cancel altogether the agency of the insurgent potential of making any kind of political statement through horrific violent means, but reserve in all plenitude the very same rights of the hastily cobbled together, and somewhat amorphous, “coalitions of willing states,” a narrative that I may not fully pursue here.

⁴² *Ibid.* at 4.

⁴³ *Mythologies*, trans. by Annette Lavers (New York: Hill & Wang, 1972).

⁴⁴ See Deleuze & Guattari, *supra* note 38 at 351-423. A very close reading of this difficult text helps one understand the distinction and relationship of the state and the “war machine.” The state is not the “war machine,” liable to be “confused with the line of State domination,” but, rather, the “war machine” is “exterior” to it (*ibid.* at 354). Indeed, “War machines take shape against the apparatuses

“war machine” of insurgent “terror” through suicide bombers (a site and a process that steadily converts sacrificial human bodies into networks of weapons of mass destruction). All this now heavily complicates, and with deep misfortune for human rights, justificatory discourse concerning insurgent, state, and retaliatory forms of the across-nation “terrorisms.”

An unusual mix of propaganda, politics, and policy, which structured the world community’s pre-9/11 reticence to define the phenomenon of “terror”/“terrorism,” has now given way to the new, rather encyclopaedic, post-9/11 legislative exuberance towards defining its modes.⁴⁵ Indeed, prior to 9/11, both the incumbents and the “nomadic” insurgents understood “terror” in a different way.⁴⁶ Summarily put, “terror” signified within-nation practices of collective political violence by some insurgent state actors against the duly, or more routinely *unduly*, constituted regimes of political domination. By the common consent and conduct of “civilized nations,” “terror” was an exclusive term of description reserved for the practices of non-state, and insurgent, violence.⁴⁷ By definition, such violence/force, within and across the international law constituted borders and boundaries, was pronounced both illegitimate and

that appropriate the machine and make war their affair and their object” (*ibid.* at 423).

⁴⁵ Concerning the earlier reticence to define terrorism, see Alex Obote-Odora, “Defining International Terrorism” (1999) 6 Murdoch U.E.J.L. 1. But see Commission on Crime Prevention and Criminal Justice, *Strengthening International Cooperation and Technical Assistance in Preventing and Combating Terrorism*, UN ESCOR, 13th Sess., UN Doc. E/CN.15/2004/8 (2004). See also Bianchi, *supra* note 33 at 3-24, 103-212, 283-307, 491-534; Christopher C. Joyner, “The United Nations and Terrorism: Rethinking Legal Tensions Between National Security, Human Rights, and Civil Liberties” (2004) 5 Int’l Stud. Perspective 240; and James Thuo Gathii, “Torture, Extraterritoriality, Terrorism, and International Law” (2003) 67 Alb. L. Rev. 335.

⁴⁶ See the magisterial presentation by Laqueur, *Terrorism*, *supra* note 1.

⁴⁷ That this was not always so is hinted at by Alain Badiou in a reference to the Jacobins during the French Revolution who “had no problem in declaring themselves ‘terrorists.’” See Badiou, *supra* note 10 at 144. Badiou thinks it remarkable that “the word ‘terrorism,’ which clearly qualified a particular figure of the exercise of State power, has come, little by little, to signify exactly the contrary” (*ibid.*). This understanding, of course, ignores other insurgencies against the state/civil society orderings that sustain vicious orders of patriarchy. For example, Claudia Card insists that the “stereotype” of insurgent political “terrorism” does not merely ignore “state terrorism,” but also “terrorism in the home and the terrorism of rape, both stranger and acquaintance rape, with which women and girls are left to cope routinely, even in many states that are considered relatively secure from external attack.” See Claudia Card, “Making War on Terrorism in Response to 9/11” in Sterba, *supra* note 10, 170 at 179. Likewise, the deep ecology activism speaks of “eco-terrorism” regarding the contemporary forms of global capitalism, and militant animal right movements retaliate against forms of technoscience “terrorism” that impose mindless cruelty on sentient experimental animals. Peoples living with disability have yet to christen their violent stigmatization as a structural instance of state/civil society “terrorism.” The lesbian/gay transgender communities similarly have to adopt the languages of protest against homophobic “terrorism.” The naming of equivalent chains of “terrorisms” remains a difficult future task.

illegal. International law discursivity concerning "terrorism" was revived only after 9/11, even though a General Assembly Resolution in 1970 (not reiterated by the Security Council until 1998 in Resolution 1189) had configured the landscape in terms of international obligations of all member-states: "to refrain from organizing, instigating, assisting or participating in ... terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts."⁴⁸

Understandably, approaches to definitions of "terrorism" in the long decades preceding the 9/11 era—manifest in the twelve pre-9/11 UN instruments⁴⁹—are unable to accommodate this epistemic shift from the paradigm of within-nation to across-nation acts of "terror." Even the North States were loathe to define "terrorism" and thus furnished, in a pre-9/11 world ordering, an indifferent archive of ratification and implementation. Clearly, any adherence to the spirit and letter of the 1970 General Assembly Resolution would have made the hot pursuit of the Cold War both illegitimate and illegal. On any sensible human rights reading of it, the Cold War, in its many phases, materialized itself worldwide only through such territorially based serial, and cumulative, performative "terrorist acts." At the same time, the 1970 General Assembly textualities enabled and empowered the sanitizing distinctions between within-nation and international "terrorism."

Additional aggravations stood both posed and furnished in negotiation of approaches to "state terrorism" in recourse to, and conduct of, "war" and "warlike" manifestations of inter-state violence. War, and warlike hostilities, as Emmanuel Levinas teaches us all, "renders morality

⁴⁸ *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), GAOR, 25th Sess., UN Doc. A/8082 (1970) 121 at 123.

⁴⁹ The UN conventions on terrorism are: *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 1971; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 1988; *Convention for the Suppression of Unlawful Seizure of Aircraft*, 1970; *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 1963; *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1991; *Convention on the Physical Protection of Nuclear Material*, 1980; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, 1973; *International Convention against the Taking of Hostages*, 1979; *International Convention for the Suppression of Terrorist Bombings*, 1997; *International Convention for the Suppression of the Financing of Terrorism*, 1999; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 1988; and *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, 1988. See generally Bianchi, *supra* note 33.

derisory,” especially when “enjoined as the very exercise of reason.”⁵⁰ Its ultimate obscenity sustains the “suspension of the ethical” and conduct hostile to human rights. International lawyers, the heirs of Hugo Grotius, remain familiar with the drudgery of the complex, cruel, and contradictory tasks—that is, of the hermeneutic production of international outlawry of “war” (outside the customary regimes of self-defence), of the just regimes of “humanitarian intervention,” and of the constant rewriting/negotiation of the norms of “proportionality” and “reasonableness” in any justifiable use of force—in the development of distinctions that confined waging and conduct of war, or war-like hostilities, through the discursive normativity of *jus in bello*, *jus ad bellum*, and, to some extent, *jus post bellum*.⁵¹ But at no stage does “state terrorism” emerge as a figuration of thought in the evolution of the genres of the international law of war and humanitarian law, the customary and conventional right to self-defence, and the limits of conduct of belligerent or military occupation. Unsurprisingly, the term “state terrorism” is, as yet, not a term of art in either international law diction or the United Nations’ official epistemology; at best some communities of human rights activists use it.⁵²

And yet Euroamerican “state terrorism” was the rule, not the exception. I believe that all participants in the Third World Approaches to International Law (TWAIL) discourse ought to examine the histories of the colonial wars of “terror”; whether the histories of chattel slavery in human beings, the savage treatment of indigenous peoples during colonization, or the myriad forms of colonial conquest, subjugation, occupation, and apartheid. Their sense of history of the making of the modern international law may no longer escape the burdens of understanding and explicating fully the formative histories of “white terror.” Likewise we may also speak of the “brown,” “black,” “yellow,” or “red” cross-border regimes of “terror.” Political correctness now forbids any revisitation of colonialism, apartheid, and the Cold War regimes as “terrorist” regimes lest this may entail “racial” or “ethnic” stereotypes and revive impermissible forms of xenophobia, discrimination, and intolerance. But neither may the forms of

⁵⁰ *Totality and Infinity: An Essay on Exteriority*, trans. by Alphonso Lingis (Pittsburgh: Duquesne University Press, 1969) at 21.

⁵¹ See generally Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977) [Walzer, *Just and Unjust Wars*]; Michael Walzer, *Arguing about War* (New Haven, Conn.: Yale University Press, 2004) [Walzer, *Arguing about War*].

⁵² It remains arguable though that the Statute of the International Criminal Court now articulates variously the abhorrent practices of state terrorisms through the reconstituted categories of crimes against humanity. See Antonio Cassese, “Terrorism as International Crime” in Bianchi, *supra* note 33, 213.

ensorship, thus imposed, gainsay the inherent racism of modern international law.⁵³ In any event, the newly instituted official prose of the "war *on* terror" now presents a "clear and present danger" to the otherwise much vaunted ontological robustness of human rights and fundamental freedoms (which enshrine near-absolute rights to freedom of speech and expression) through the mindless conversion of forms of free speech into hate speech and honest democratic dissent into potential treason, as well as the new Panopticon of digital "data mining."⁵⁴

I may not pursue here (for reasons both of space and competence) the precise ways in which the (hopefully) old-style state "terrorism" represents itself, or opens itself up to representation, as the "war *of* terror." But I must at least note here that this war has its principal agents—the "nomadic" multitudes⁵⁵ of non-state actors—deploying indiscriminate orders of mass violence, justifying their militant exertions as responses to the combined and uneven axes of development of the manifold forms and practices of "state terrorism," and ideologizing their violence as multiplex "emancipation" from the terrors of the Westphalian, and now so-called post-Westphalian, imperial global state formations. What this "war *of* terror," in 9/11 formats, desperately seeks to destroy is the new ordering of *Pax Americana* and its imperial politics of denial of difference. The politics of the war of terror depict indiscriminate killing of the "enemies" everywhere in terms of a global *jihad* against the reproduction of an American Empire that, in its scramble for oil and petroleum resources, bolsters tyrannical regimes worldwide, and especially in the Middle East, thus thriving on "petro-violence."⁵⁶ Its enactments of forms of violent global "justice" fulsomely repudiate what it considers to be the "Westoxification" of the contemporary world, a form that annihilates religious and civilizational plurality.

The protagonists of the "war *on* terror" may, and some actually do, contest these justifications that now insist that the "war *of* terror" also

⁵³ For a recent discussion see Patricia Tuitt, *Race, Law, Resistance* (London: Glasshouse, 2004).

⁵⁴ See Samuel Dash, *The Intruders: Unreasonable Searches and Seizures from King John to John Ashcroft* (New Brunswick, N.J.: Rutgers University Press, 2004); Jeffrey Rosen, *The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age* (New York: Random House, 2004).

⁵⁵ See Michael Hardt & Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (New York: Penguin Books, 2004). A more complex understanding of this notion is offered by Paolo Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, trans. by Isabella Bertolotti, James Cascaito & Andrea Casson (Los Angeles: Semiotext(e), 2004).

⁵⁶ See Michael Watts, "Petro-Violence: Community, Extraction, and Political Ecology of a Mythic Commodity" in Nancy Lee Peluso & Michael Watts, eds., (Ithaca, N.Y.: Cornell University Press, 2001) 189.

ought to follow some just-war type paradigmatic restraints. One may thus, in the first place, maintain that the agents of the war of terror, even when they consider recourse to acts of “terror” as somehow justified, ought to exhaust all available peaceful means for the righting of wrongs. Violent recourse must be the recourse in the last instance. This “determination in the last instance” (to adapt a phrase of Louis Althusser from a different context⁵⁷) entails some reflexive ethical labour on the part of these agents, conceived, of course, as moral agents. Second, the onus of proof, or the burden of moral justification, for the incitement or perpetration of acts of “terror” ought to weigh heavily with their agents. Third, such agents ought to consider on various grounds the relation between the ends and the means. A disproportionate and unreasonable use of violence (the means) may defeat their ends (howsoever conceived). Put another way, their violence ought to follow some version of Paretian optimality, in which everyone is better off and no one worse off by such recourse. Fourth, such agents ought to at least adopt the medieval virtue of “chivalry,” forbidding the killing or wounding of infants and the aged, sick, infirm, and disabled, the violation of women, and the worst forms of mercenary cruelty that entail threats and actual performance of killing hostages where ransom, in cash or kind, is not forthcoming. Any “terrorist” violence ought to fully foreground its means (wanton acts of massacre or cruel, degrading, or inhumane treatment that necessarily invite similar retaliation) in relation to its ethical ends. This obligation ought to weigh especially heavily on those agents of “terror” who base their justifications of violent performance in terms of any privileged hermeneutic of religious ethic. Fifth, if the “war of terror” is to be comprehensively described in terms of a “justified” and necessarily violent critique of forms of contemporary global capitalism (read globalization), its violent overthrow must, after all, remain an ethically viable project, when all related projects remain celebrated only in terms of funerary notes. Sixth, some order of *jus post bellum* obligations remain co-equally owed by agents of both the “wars.”

Overall, and put another way, only an “ethical” discourse concerning “terrorism” may justify acts of “terror” because outside this it summons fully the “war on terror.” Failure to accomplish this ethical/moral feat entails precisely the endless reproduction and exchange of the Badiouian “disjunctive” circuits of nihilistic violence. Put in yet another way, the nomadic insurgents always bear the responsibility of producing a superior morality/ethics than what remains available, in terms of Realpolitik, to the aggressive incumbents.

⁵⁷ See Louis Althusser & Étienne Balibar, *Reading Capital*, trans. by Ben Brewster (London: Verso, 1979) at 216-24.

The failure of nomadic multitudes to produce such an overall ethic now justifies the dystopias of Realpolitik reinvention of the war on terror, which summon heavily the imagined Utopias of human rights with all its fierce plenitude of the languages, logics, and paralogics of human rights. In the end, such diverse adversaries as Osama bin Laden and George W. Bush/Tony Blair, even when locked in a mortal embrace, proclaim with equally ferocious felicity the justifications for institutionalizing the legitimation of the escalating violence in their distinctive pursuits, celebrating the superiority of their own conceptions of a "just" world ordering. "Death to the enemy," and privileged versions of the "final solution," is their common slogan, enacted through the ever-escalating orders of vicious violence. Both the forces conceive the future of world orderings and of the future of human rights within these violent paradigms, with equal orders of courage, craft, and contention.

In setting out these grand generalizations, we run not merely theoretic narrative risks, but unfortunately also expose ourselves to an invidious invitation to Guantanamo or Belmarsh or even their equally hideous third-world counterparts. However, it remains necessary to probe the schizoid-paranoid discourse of both the war *on* and *of* terror beyond the obscenely assembled normative justifications of the cultures of impunity thus variously harboured. Perhaps at no moment of human history are patient and creative engagements with ethnographies of human suffering and violation more imperative.⁵⁸ What is imperative is to go beyond the monological perversity of "either you are for or against us" type talk. The stakes are far too high, I believe, to allow any indulgence in a Manichean-type discourse contrasting, even conflating, the good and the evil. The TWAIL epistemic and activist communities, baptized into ways of living under conditions of "terror" in the Third World (whether inflicted by the First World or in their autochthonous forms and formats), surely need no North-dominated reminders concerning how they may proceed to address these two "wars."

IV. THE DESTRUCTION OF THE "OLD" INTERNATIONAL LAW

The "classical" norms of the law of nations die many a death in the process of the two "wars." Both of the "terror" wars voraciously devour—in all their varied aftermaths and aftershocks—forms, contexts, histories,

⁵⁸ See Cynthia Keppley Mahmood, "Terrorism, Myth, and the Power of Ethnographic Praxis" (2001) 30 *J. Contemp. Ethnography* 520; Michael Herzfeld, *Anthropology: Theoretical Practice in Culture and Society* (Malden, Mass.: Blackwell, 2001).

symbolisms, significations, and standards of respect for international human rights and humanitarian law. Both remain mired in what Alain Badiou describes as “the disjunctive synthesis of two nihilisms,”⁵⁹ which foster, on the one hand, a violent—even aesthetic—taste for the politics of imperial global hatred for nomadic multitudes and, on the other, the immense and awesome politics of insurrectionary desire, animating the very diversely enacted political hatred of the imperial, for example, by the diasporic Palestinian peoples, the Chechnyan “rebels,” and, even more cruelly, the rather ineffable Al-Qaeda forces. The disorder of the violent articulation of politics of desire for identity (and the often coerced associated practices of identification that now haunt, on all sides, an uncertain global political future of, and for, human rights) remains decisive on these consecratory registers.⁶⁰

What may both of the wars inaugurate by way of profound and abiding human rights and humanitarian law destruction? Certainly, they destroy the classic foundations of comity between nation-states; re-write international law prohibition on recourse to aggression against equal sovereign states; and erase almost entirely the distinctions between civilians and combatants, and the painstakingly evolved regimes of limits of power in circumstances of military or belligerent occupation. In a profound sense, then, both of the wars constitute simultaneously a “war” on human rights and humanitarian law, and remain liable to an indictment of being (and becoming) “the war against pluralism.”⁶¹ They seek to resituate the values and visions of human rights within the circuits of collective human security, defined primarily—if not wholly—in ways that serve the strategic interests of the emerging American Empire and resistance to it. Further, as has been often remarked (and with somewhat greater salience by Hardt-Negri), the “war against terror” is a war without end; it is a war in which states, singly and in concert, violently engage a whole range of amorphous and cross-border non-state actors and networks; a war that may remain so un-winnable on either side as to obliterate the very distinction drawing bright lines between victory and defeat.

The ways in which this war stands waged also flattens historical time, reducing many histories of multiple terrorisms to a single date (that is, 9/11), summoning a singular reconstitution of global public memory that simultaneously also organizes collective amnesia of sources and causes, means and methods, ideologies, and structures of varieties of collective

⁵⁹ *Supra* note 10 at 158-62.

⁶⁰ See Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002).

⁶¹ See Robert L. Phillips, “The War Against Pluralism” in Sterba, *supra* note 10, 101.

political violence called "terrorism." 9/11 and its continuing aftermaths also entail some extraordinary representations of massive, often "Star Wars" type, retaliatory response, which is justified by framing collective human security as a *global public good*. This perspective instantly de-legitimizes acts and performances of mass international "terrorism" as feats achieving the production of *global public bads*. It also equally instantly legitimates the global war on terror—as the reproduction of global public goods; the recomposition of international relations, law, and organization; and the installation, in the process, of both a messianic and Manichean ethic and flows and networks of combined and uneven formations of counter-"terrorism."

A new global ethno-nationalism, if one may so name this happening, is now in the making; it proclaims some inherent virtues of solidary global public citizenship, extending beyond bounds the celebrated notion of "constitutional patriotism" adumbrated by Jürgen Habermas.⁶² Because each one of us may be enmeshed in serial performances of mass political violence, each one of us also stands imperatively encased/interpellated within the logics, paralogics, and languages of "war on terror." These cultivate notions of public virtue in terms of a binary ethic (either you are *for* or *against* terrorism) and its associated regimes of the emerging positive global morality that seek to disarticulate any recourse to critical morality in relation to the war on terror, in all its fierce and mighty pursuit. Any ethical ambivalence stands condemned thus as complicitous with "terror." This new global ethic in the making extravagantly forfeits and squanders all potential for non-violent pursuit of the creation of dialogic timeplaces, disarticulating alternate versions of international comity as a global public good.

V. THE DESTRUCTION OF COMITY

Comity among nations is, indeed, a grudging virtue.⁶³ Certain forms of inter-state courtesy and good will, while not furnishing a source of authoritative legal obligations, were, in the eye of recent history, a

⁶² See Jürgen Habermas, "Appendix II: Citizenship and National Identity" in Jürgen Habermas, ed., *Between Facts and Norms: Contributions to a Discourse of Law and Democracy*, trans. by William Rehg (Cambridge, Mass.: MIT Press, 1996) 491; Jürgen Habermas, "The Postnational Constellation and the Future of Democracy" in Max Pensky, ed., *The Postnational Constellation: Political Essays* (Cambridge, Mass.: MIT Press, 2001). See also John Erik Fossum, "Deep Diversity versus Constitutional Patriotism: Taylor, Habermas and the Canadian Constitutional Crisis" (2001) 1 *Ethnicities* 179.

⁶³ See Upendra Baxi, "Mass Torts, Multinational Enterprise Liability, and Private International Law" (1999) 276 *Recueil des Cours* 297 at 403-05.

Eurocentric virtue practised by “civilized” nations of the West in their dealings *inter se*. It, of course, did not extend to their dealings with the rest of the world. Its origins are notoriously multiplex and multiple; they may be traced both to the era of European chivalry and the moral histories of the feudal virtue of honour that so brutally, if unevenly, combined forms and practices of interactions between colonizers and the colonized.⁶⁴ The development of comity was, however, a “whites-only” kind of virtue in international relations. The “savage,” the “barbarian,” the “heathen,” and the “unenlightened” masses of peoples and their political organization were placed outside the zones of comity, if only with a view to promote their capabilities for “civilization” and eventual induction into the family of nations.⁶⁵ Even so, beneficial access to the practice of comity by all co-equal sovereign states and peoples now remains the foundation of a post-Westphalian order; this is now exposed to severe interrogation, especially by the United States.

Overall, comity performed certain useful tasks, establishing a modicum of civility among nations, even in the post-Westphalian order marked first by decolonization and now by current economic globalization. In particular, practising comity meant many orders of civility that informed magisterial evolution of the law of armed conflicts. For example, classical international law developed the practice of this virtue by requiring that the intention to go to war be notified by a declaration of war; undeclared hostilities or warfare were disfavoured. Customary international law stood informed by comity considerations when it prescribed that the use of force—even in situations of self-defence, reprisal, or retorsion—must be both reasonable and proportionate. Comity also did much silent work in the historical fashioning of the norms and standards of international humanitarian law, governing treatment of prisoners of war, the sick and wounded, and non-combatants caught in the vicious web of armed conflict. The conduct of comity was also grounded in prudential considerations. If the minimal ethical cooperation, even amidst armed conflicts, was to become a sovereign norm, winning wars remained morally worthy only if belligerent conduct retained a modicum of regard for the dignity and decency that strove to minimize “unnecessary” human suffering, even when “unnecessary” was interpellated within shifting grounds and doctrines of military necessity. Further, the idea that war should be a matter of last

⁶⁴ Historians of international law surely know that the practice of this virtue, and indeed understandings of it, was derived by the colonizing and imperial powers from the subject nations and peoples; but we must let this pass.

⁶⁵ See Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42 Harv. Int’l L.J. 201.

recourse was not altogether uninformed by the ethic of comity; after all, war remained conceived of as a necessary contribution to some steady states of peaceful cooperation among nations.

The ongoing war on terror now almost totally erodes this institutionalized ethic of comity in international relations. The Taliban regime in Afghanistan, for example, rather remarkably reasserted the genre of classical comity norms when it insisted that the United States follow the old, and classical, norms of comity in international law and relations that rendered aggression a matter of last recourse. Following the classical comity patterns, the regime asked for *prima facie* evidence that suggested its complicity with Osama bin Laden; it assured that upon its production and verification, it would do its governmental best to locate him and his nefarious/multifarious associates; it then insisted that it would deliver them to any Islamic nation for a public international criminal trial for the commission of "crimes against humanity." None of these inherently dialogic requests were heeded by the United States in the "light" of a pre-determination to "discipline and punish" the Taliban.

No international due process obligations, informed by the yesteryear virtue of comity, were thus owed to a regime once installed by the very same superpower that observed these norms of comity rather seriously in its earlier dealings with it. Fostered and deployed, once upon a time, as a "progressive" force that led to an astonishing defeat of the Soviet Empire, and co-opting, as is by now well known, Osama bin Laden, and his cohorts, as allies in the Tom Clancy-like power plays between the then two global superpowers, this regime is now presented as the post-Cold War threat to a new Cold War solitary superpower. Osama, a one-time darling of American foreign policy and secret service establishment, became its mortal enemy when he attacked the might of the American empire.

The American foreign-policy hawks insisted that the Taliban regime was simply unworthy of any expedient enactments of revised editions of international trustworthiness. It had forfeited that trust because it "harboured" Osama and his cohorts, who planned and executed the attack on the Twin Towers in New York and on the Pentagon. It did not matter that this "harbouring" occurred under the auspices of some Northern states. We know from fragmentary but still not unpersuasive accounts that many a "terrorist" found a safe haven in countries of Europe and even the United States. We now know that many European states were complicit, whether through invigilatory inadvertence of the circulation of "terrorist" personnel and resources, lax immigration laws (as for example in Belgium), or safe money laundering havens provided through the Swiss banking system and other dispersed tax havens in the First World. The notion of

“harbouring” thus remains heavily Euroamerican-centric in the current ongoing “war *on* terrorism.”⁶⁶

The conveniently indeterminate notion of harbouring also continues to preside over the discovery or the invention of new “enemies” as expediently elaborated by the global hegemon and its nomadic war machine, an articulation which also include whole civilian populaces (I write this in the devastating moment of Falluja) somehow suspected of harbouring “terrorists.” These remain exposed to means and methods of search and destroy operations that altogether disregard the classical canons of *temperamenta belli restraints*. The unproved degrees of complicity of the South states do not contemporaneously matter; it remains altogether politically incorrect even to raise the question of the Euroamerican harbouring and facilitation of the growth of “terrorist” networks before, and in the run-up, of 9/11 violence. All that matters for the “war *on* terror” are the ultimately contrived (as some conspiracy theorists would have us believe) “intelligence-failed” reports concerning the nomadic, fugitive presence of Osama bin Laden somewhere in Afghanistan, and his suspected cohorts just about anywhere in the world. Sheer suspicion remains good enough for the extraordinary, Star Wars type, military exertions directed to the total devastation of almost everything in sight that remotely approximates the “terrorist” presence and habitat. Did not, after all, Osama claim authorship of the violent events of 9/11 from somewhere in Afghanistan? This mere suspicion proved “good enough” for a threshold, and even abiding, distrust of the Taliban regime, despite its claims to capacity to deliver him to “justice.” The regime, in any event, had to be mightily liquidated forever in the hope that the process would somehow yield Osama, alive or dead.⁶⁷ In a sense, the inaugural act of the unfolding “war *on* terror” marks the beginning of the anachronistic revival, in this halcyon moment of hyper-globalization, of the medieval wars of revenge and retaliation, where considerations of comity among nations remain altogether ethically illegible. Thus begins the first chapter of the narrative of the twenty first century enactment of a new medievalism.

Let us, for a moment, indulge in a counterfactual. Imagine a zodiac in which the comity considerations prevailed, in which the dialogical demands of the Taliban regime were subjected to a system of international cooperation and verification, and in which an international regime would

⁶⁶ See e.g. Michelangelica Scalabrino, “Fighting against International Terrorism: The Latin American Experience” in Bianchi, *supra* note 33, 163.

⁶⁷ I pass by the recent extraordinary “appearance” of Osama bin Laden on Al-Jazeera on the eve of the American presidential elections. Apparently, Osama alive emerges as a far more useful figure than Osama dead!

have backed the Taliban "good faith" assertions of the efforts to track down the "terrorists."⁶⁸ Assume further that working with the Taliban constituted an estate of very limited trust, one in which specific deadlines for the accomplishment of the mission were thus set, failures being visited by the likes of the notoriously named Operation Infinite and Operation Enduring Freedom. Assume further that any accompanying success would have left open for negotiation the Taliban demand of delivery of Osama and his cohorts to a more "friendly" Islamic state, or even a "neutral" non-Islamic state, wholly amenable to the developing jurisprudence of international criminal law. After all, even Libya had agreed to a trial in Scotland for the Lockerbie disaster. Would such an exercise in renovated comity have left the world an assuredly *worse* place compared, of course, with yet another Afghan War that so disastrously took place? "What-if" questions are notorious for posing and answering, but it remains the sovereign function of comity ethic to foreground these.

Much the same, as future historians may vouchsafe for us, may be said concerning Saddam Hussein; scarcely a redemptive human figuration, and yet one for so long bolstered by the very same western powers and leaders who even proceeded to condemn Israel's unilateral bombing of an alleged nuclear reactor in Iraq as an unconscionable act of force. The Security Council discourse at that moment displayed a solicitous regard for unprovoked violation of the sovereignty of the Iraqi State. The Security Council held that the mere Israeli suspicion that a nuclear power plant may eventually be used to destroy the state of Israel did not furnish any justification for a swift foul swoop that destroyed the installation. The logic was that state entities, under international law, may not justifiably deploy force under the doctrine of anticipatory self-defence without overwhelming evidence of existence of a hostile intent, actual verification of the existence of weapons of mass destruction, and the ability to deploy these as a means and an end for a brutal assertion of power. All this scarcely furnished any ground for circumspection in the eventual unilateralist invasion of Iraq by the coalition of the willing states in 2003, even despite discord among some Permanent Members of the Security Council who insisted that a reasoned latitude of time be accorded to Iraq to comply with various foundational resolutions urging compliance with the destruction of weapons of mass destruction. Iraq's submissions to the contrary notwithstanding, the United States and the United Kingdom were, on all available evidence hitherto, determined to the rather ferocious "disarmament war" against it. And the postconflict "justifications" for this enormous use of force, and its rather

⁶⁸ Much in the same way that now characterizes the relationship between the United States and Pakistan, which some eminent Pakistani journalists now call the Bush-Mush bonhomie!

devastating impact, remain untroubled by the global social fact that its own commissions of enquiry at the highest level now altogether establish that Iraq did not, after all, possess a semblance of evidence for the construction and deployment of any orders of mass destruction weaponry.

The new normativity unleashed by the phrase-regimes of Operation Infinite and Operation Enduring Freedom now furnishes the wherewithal of a new "liberal" political theology (as Carl Schmitt named this⁶⁹), summated by the "war on terror," which, in turn, installs the exception as the rule; where the *jurisdiction of suspicion emerges as the foundational ground of jurisdiction of armed installation of global public truths* in ways that bid an unwholesome adieu to earlier normativity of comity among nation-states. The new comity stands defined in terms of arrogance of the power of the solitary global hegemon. What remains decisive is not any *truth of the matter* but the *matter of truth*, that is, the truths of political propaganda that fatefully unleash acts and performances of the war on "terror." Given this, it is unsurprising that "terrorist" groups and actors feel further empowered to plead an order of justification for the awesome violence of the causes and missions that they espouse.

VI. THE CREATION OF A "NEW" INTERNATIONAL LAW

New orders or imageries of international law always remain violently birthed.⁷⁰ It is unsurprising then that the international law now in the making owes much to "the crime of New York," and that the war on terror presents this as a decisive matrix for the making of the "new" international law. It is being formed at two distinct but related levels: the ideological/ethical and the juridico-political. Together, American exceptionalism and the assertion of a right to preventive and pre-emptive war constitute the cornerstone of the "new" international law. For the sake of argument, the first is merely a variation on the theme of superpower hegemony and the second has its own distinctive precedents in the Cuban missile crisis and the Six-Day War.⁷¹ Even so, the present justificatory

⁶⁹ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. by George Schwab (Cambridge, Mass.: MIT Press, 1985).

⁷⁰ This was the case with the struggle for decolonization that birthed the imagination of the principle of self-determination decades before it emerged as an ambiguously common pursuit of the ideal in the common Article 2 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) and the *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 999 U.N.T.S. 3 (entered into force 3 January 1976). Likewise, the creative normative insurgency of the *Universal Declaration of Human Rights* remained birthed through the horrors of genocide and "total war" on Hiroshima-Nagasaki.

⁷¹ As to the latter, see Walzer, *Just and Unjust Wars*, *supra* note 48 at 80-85.

narratives remain incomparable with past precedents.

American exceptionalism emerges as a curious mix of ethics and ideology. As an ideological presentation, this amounts to spectacular endeavours at justifying a "double standard" doctrine in a "world dominated by a single 'hyper-power,'" ⁷² reaching an apotheosis in Robert Kagan's celebration of a unipolar world where the United States acts as an "international sheriff," policing "the lawless world where outlaws need to be deterred or destroyed, often through the muzzle of a gun." ⁷³ This remains relatively easy to demystify. ⁷⁴ More difficult to engage is the ethical presentation as, for example, expounded by Elshtain, ⁷⁵ in which American exceptionalism signifies not an ethical privilege but a moral *duty* of the world's solitary surviving superpower. This does raise the question whether this duty—that is, the United States' "unrestrained freedom to act ... including the freedom to launch preventive wars against distant threats—offers the world's best chance of fulfilling cosmopolitan values." ⁷⁶ May I venture to suggest that the agenda of future TWAIL labours, now thus posed, entails the addressal of the hard, and harsh, task that focuses a responsive and responsible counter-ethical critique?

At the technical juridico-political level, the foundations of the "new" international law are being laid through a complex mosaic of the individual and collective right to "preemptive" self-defence, justifications for the use of United Nations unsanctioned use of force for the violent achievement of "regime change," and the equally violent disregard for the hitherto relatively settled norms of international humanitarian law. ⁷⁷ In addition, at least three hermeneutic canons now stand proposed. First, the "rogue" or "outlaw" states (howsoever determined, and, of course, this

⁷² See David Luban, "Preventive War" (2004) 32 Phil. & Pub. Aff. 207 at 237.

⁷³ Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York: Knopf, 2003) at 36-37.

⁷⁴ I agree here with the trenchant point by Luban, *supra* note 66 at 247 that "Kagan attributes a kind of altruism to U.S. foreign policy that is hard to square with the historical record."

⁷⁵ See text accompanying Elshtain, *supra* note 22.

⁷⁶ Luban, *supra* note 66 at 248. See also Lea Brilmayer, "Realism Revisited: The Moral Priority of Means and Ends in Anarchy" in Ian Shapiro & Lea Brilmayer, eds., *Global Justice* (New York: New York University Press, 1999) 192 at 192-215 [Brilmayer, "Realism Revisited"]; Lea Brilmayer, *American Hegemony: Political Morality in a One-Superpower World* (New Haven, Conn.: Yale University Press, 1994). Of course, Walzer, *Just and Unjust Wars*, *supra* note 48 remains an indispensable text, even if, in the present circumstance, a rather tormenting one.

⁷⁷ In sum, the "legalist paradigm" of just war offered in Walzer, *Just and Unjust Wars*, *supra* note 48 at 58-73.

decisively matters⁷⁸) need to be “disciplined and punished” by (howsoever proclaimed) bearers of the values of international rule of law, human rights, fundamental freedoms, and democracy. Second, the new “wars of terror” render the earlier practices of reading the “hard” and “soft” international law texts, in all their indeterminate intertextualities, somewhat, and at moments even altogether, otiose. Third, rank consequentialism now propounds itself as a new canon of rhetoric justification; the ouster of the “evil regime” of Saddam Hussein in Iraq and the recent “free and fair” elections in Afghanistan now seem to fully justify all the Hydra-headed, and accordingly monstrous, violations of international human rights and humanitarian law, values, norms, and standards in the hot pursuit of the “war on terror.” Certainly, from a TWAIL perspective, these three features innovating the global deliberative rationality present an immense reversal of the historic third-world contribution to the making of the post-Second World War international law normativity.

A. *The Novel and Dangerous Doctrine of Preemptive Self-Defence*

Centrally, this happening consists in the invention of the doctrine of “preemptive” self-defence, somehow to be distinguished from the individual and collective right of self-defence as understood prior to and since Article 51 of the UN *Charter*. I do not here revisit the sky-high doctrinal literature on the subject save to say that the claimed right to preemptive self-defence is a recent, unique but wholly dubious, innovation in international law.⁷⁹

The *cognoscenti* have already proclaimed that the invasion of Iraq holds the potential not just for “transformation” of legal control over international conflicts but also for its “destruction.”⁸⁰ Thomas W. Franck laments that this “preemptive” invasion shows that the regime of restraints on use of force by states “has died again, and, this time, perhaps, for

⁷⁸ For a normative justification, in terms of practical political reason for the foreign policy of “well-ordered” peoples, see John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999). See also perhaps the very last and, as always, the abiding discursive contribution by Jacques Derrida, “The Last of the Rogue States: The ‘Democracy to Come,’ Opening in Two Turns” (2004) 103 S. Atl. Q. 323.

⁷⁹ Even so, reference to some insightful explorations remains relevant. See especially Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002); Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000); and Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963).

⁸⁰ See Lori Fisler Damrosch & Bernard H. Oxman, “Editor’s Introduction” (2003) 97 Am. J. Int’l L. 553.

good.”⁸¹ He further suggests—rightly, in the present opinion—that it heralds “a much broader plan to disable all supranational institutions and the constraints of international law on national sovereignty.”⁸² Most recently, the UN Secretary General pronounced the Iraq war as “illegal.”⁸³ Further, even as discerning a philosopher as Michael Walzer (who endorsed on ethical grounds the justification offered for the Six-Day War, 1967, and the Israeli strike against the Iraqi nuclear reactor facility) now declares the Iraq war as *injustum bellum*, *injustum in bello*, and *injustum post bello*.⁸⁴

Arrayed against this impressive consensus, stand some contrary argumentation strategies that seek to justify the existence of such a right with reference to the Cuban missile crisis⁸⁵; no matter howsoever a weak analogy, especially when read with the United Nations condemnation of the Israeli air strike at the nuclear facility in Iraq,⁸⁶ it remains arguable that “new terrorism” may pose some extraordinary prospects of devastating use of biological or nuclear “terrorist” action, no matter (as noted earlier) how improbable. Cleverly and craftily constructed scenarios of future “terrorism” thus aid and abet the primacy of the newly fangled discourse concerning the international law sanctioned/sanctionable right of “preemptive” war. How might the TWAIL, and other epistemic

⁸¹ “What Happens Now? The United Nations After Iraq” (2003) 97 Am. J. Int’l L. 607 at 610.

⁸² *Ibid.* See also Jules Lobel & Michael Ratner, “Bypassing the Security Council: Ambiguous Authorization to Use Force, Cease-Fires and the Iraqi Inspection Regime” (1999) 93 Am. J. Int’l L. 124; Michael Byers, “Preemptive Self-defense: Hegemony, Equality, and Strategies of Legal Change” (2003) 11 J. Pol. Phil. 171; and Wade Mansell, “Goodbye to All That? The Rule of Law, International Law, the United States, and the Use of Force” (2004) 31 J.L. & Soc’y 433.

⁸³ The Secretary General categorically stated in a BBC interview that “from our point of view, from the charter point of view,” the Iraq war “was illegal.” See “Iraq war illegal, says Annan” *BBC News* (16 September 2004), online: BBC News <http://news.bbc.co.uk/2/hi/middle_east/3661134.stm>.

⁸⁴ Walzer, *Arguing About War*, *supra* note 48. See also Garry Wills, “What is a Just War?” *The New York Review of Books* (18 November 2004) 32, online: The New York Review of Books <<http://www.nybooks.com/articles/17560>>. See also Peacerights, “Report of the Inquiry into the Alleged Commission of War Crimes by Coalition Forces in the Iraq War During 2003,” online: McGill University <<http://www.law.mcgill.ca/news/attachments/2004-04-23-report-iraq.pdf>>. This report by eight international lawpersons examines the legality of the conduct of the Iraq War under the terms of the Statute of the International Criminal Court. It has now been presented to the Prosecutor of the Court for further necessary action.

⁸⁵ See John C. Yoo, “International Law and the War of Iraq” (2003) 97 Am. J. Int’l L. 563. Yoo here rather blithely presents as “facts” matters that remain unfortunately suspect as “propaganda.” But see George Farebrother & Nicholas Kollerstrom, *The Case Against War: The Essential Legal Inquiries, Opinions and Judgments Concerning War in Iraq* (Hailsham, U.K.: Legal Inquiry Steering Group, 2003).

⁸⁶ See Anthony D’amato, “Israel’s Air Strike upon the Iraqi Nuclear Reactor” (1983) 77 Am. J. Int’l L. 584.

communities, remain justified in their curt gestures of dismissal of this discourse as merely ideological? Should they instead not attend more closely to the ethical justifications and entailments? How may these critique any good faith based recourse to a general “preventive war” doctrine?⁸⁷ In particular, how may we critique this doctrine in terms of a more secure future for human rights?

The overwhelming question still remains: How may the “war on terror” proceed and which understanding of “reasonableness” and “proportionality” of the use of force may legitimate this “war,” both in its conduct as “war” and its aftermath—the continuing belligerent occupation (now exemplified in Iraq)—in the languages of *jus post bellum*? Faced with this doctrinal disputation, some international lawpersons now suggest a hasty and hurried bypass surgery that may wantonly cause the destruction of the patient, here signifying both the corpus/corpse named as “international law.” They make a fervent plea for the development of a “new doctrine concerning the use of force” based on law and economics type approaches. John Yoo has recently suggested that we draw upon the resources of “hegemonic stability theory” concerning the production of international public goods.⁸⁸ On this approach, as far as is intelligible, international public goods are best “provided by a single great power or small group of powers—the hegemon” in ways that both maximize utility and “overcome the collective action problem presented by large numbers of states in an anarchical international system.”⁸⁹ I may not here rehearse this “sophisticated” argument. Nor may its full consequence consist, to adapt a phrase of Antonio Cassese, in a new “Return to Westphalia.”⁹⁰ Nor, further, may I here (for reasons of space) revisit some recent alternate revisitation of the human rights oriented theory of global public goods.⁹¹

⁸⁷ David Luban assails the emergence of such a regime on three grounds: First, “it broadens the category of permissible wars”; second, “it includes in the category situations where the burdens and infirmities of judgment are unavoidable”; and third, it “makes rival states into legitimate targets of each other’s preventive wars.” See Luban, *supra* note 66 at 288. All in all, thus, “the doctrine of [preventive wars] is too permissive” (*ibid.*).

⁸⁸ See John Yoo, “Using Force” (2004) 71 U. Chicago L. Rev. 729 at 792.

⁸⁹ *Ibid.* However, as a general proposition this hegemonic “right” may not be universalizable; the new nuclear states (India and Pakistan) and the threshold nuclear states (Israel, Iran, and North Korea) may not invoke this “right.” Further, Southern States may not recourse to preemptive force against Northern states allegedly supporting “terrorism.”

⁹⁰ See Antonio Cassese, “Return to Westphalia? Considerations on the Gradual Erosion of the Charter System” in Antonio Cassese, ed., *The Current Legal Regulation of the Use of Force* (Dordrecht, Netherlands: Martinus Nijhoff, 1986) 505.

⁹¹ See e.g. Inge Kaul et al., eds., *Providing Global Public Goods: Managing Globalization* (Oxford: Oxford University Press, 2003).

However, any attempt at laying the "new" foundations for international law pose grounds for grave anxiety when the militaristic production of collective human security as an international public good is presented as the only or the best alternative to meet the challenges of the "war of terror." Any fundamental rethinking of the normativity of restraints on the use of force in international relations, solely in terms of a new hegemonic calculus, has little or no use for the old "shibboleths" such as the doctrine of sovereign equality of states, international human rights and humanitarian law, and the normative, human rights friendly, jurisprudence of the UN *Charter*. These do not hold any real potential, on this view, for the production of the international public good of collective human security.

B. *Politics and "Law" of Regime Change*

Regime change now threatens to become a term of art on a consequentialist justification servicing the dangerous incoherence of the newly-fangled doctrine of "preemptive" self-defence, or more simply and starkly, the normatively uncanalized aggressive "preemptive" use of force. The illegality, or ambiguous legality, of the Afghan and Iraq invasions thus stands liable to be generalized beyond the now fiercely maintained argumentation that the world is "a better place" without Saddam Hussein or the Taliban. Closely examined, this, of course, constitutes an unalloyed justification for "tyrannicide," with all its complex and contradictory history,⁹² and yet outlawed by any, even the most "scriptural" and "spiritual," grasp of the UN *Charter* and jurisprudence. In any event, tyrannicide is not as of yet a human right, although so claimed in the ancient and long history of its supporters. Ought this right, now expressed in the languages of justified ouster of tyrants (including, where feasible, their being killed), become "legitimate" as an instrument of liberal foreign policy in the pursuit, somehow, of cosmopolitan values? The "new" international law regime-change articulations, at the end of a terribly devastating day, posit an unjustifiable norm, but because the best of ameliorative world order considerations will never countenance justifications for equally pertinent and vast regime changes in the coalitions of willing states. Prescinding this pragmatic hegemonic argument, there exist some intrinsic moral reasons militating against a universalization of the doctrine of violently imposed regime change, which I may not

⁹² See Oscar Jászi & John D. Lewis, *Against the Tyrant: The Tradition and Theory of Tyrannicide* (Glencoe, Ill.: Free Press, 1957). I thank Peter Jaszi (Professor of Law, Washington College of Law) for making available this now out-of-print, even rare, text. See also Franklin L. Ford, *Political Murder: From Tyrannicide to Terrorism* (Cambridge, Mass.: Harvard University Press, 1985).

adequately address here.

State hegemonic theory seeks, then, at the end of the day, or rather its long neo-colonial night, to limit the doctrine of enforced regime change only in respect to the subordinate/subaltern units of international order. Only these remain vulnerable and liable to aggressively enforced regime change. The hegemonic regime-changers acknowledge no dignity of discourse, whether in terms of international law or morality, to the “evil” regime-incumbents. Put another way, the violent regime-changers may not be constrained in any way in their serial aggressive pursuits by any regard for or consideration of their own past histories of presentation/representation of these very regimes as producers of international public goods. Further, the hegemon may itself observe no restraint whatsoever in its sudden, swift, and steadfast deconstruction and reversal of regimes that now, at will, are christened as “evil regimes” liable to unscrupulous and aggressive overthrow. All that decisively matters then is the instant and contemporaneous characterization by a global hegemon of a regime as actually or potentially evil, this evil now being defined in terms of alleged and inherently improvable complicity with “terrorists” (if only because the latter constitutes a mobile horizon of actors, networks, and histories of prior support and nourishment of these by their current prosecutors).

The consequentialist regime change discourse gloats over the happenings of some “benign” transformations. Thus, Donald Rumsfeld now celebrates in full international gaze, over CNN, his wide-eyed wonder that the Afghan people have actually voted in “free and fair” elections (he keeps on refraining that the poll results are “*amazing!*”). Likewise, the triumphalist discourse of Prime Minister Tony Blair exults (in the House of Commons Debates) the demise of Saddam Hussein, as providing somehow the ultimate moral justification for the manifold horrors of the Iraq war! This discourse seeks to altogether silence dissident voices, at home and abroad, that protest the enormity of orders of civilian casualties, the perfidies of lawless military/belligerent occupation, the endless shifting prevarications concerning the “postconflict” transition of Iraq, and much else besides (especially in terms of the rather singular non-division of spoils resulting from this invasion that restricts the bounty/windfall to the American corporate world).

The performative instantiation/actualization of the “new” international law of regime change invites politically non-partisan critical deliberative attention, if only because it portends new discursive styles addressing the future of international law and a global ethic of international relations amidst the wars *of* and *on* “terror.” At stake, rather summarily put, remain the conflicting deontological and consequentialist approaches

to regime change that go beyond simple "moral recipes."⁹³ How may any imagination of a "new" international law aspire to institute normative restraints on the politics of regime change, which now threatens to burgeon in further unfoldment of the war on terror? At least, we may ask, what new orders of the Grotian *temperamenta belli* ought to inform the career and future of these horrendous justifications pressed in the pursuit of regime change? And what duties of assistance and reparation may be owed for excessive and unrestrained use of force?⁹⁴

VII. *JUS POST BELLUM*

All this, then, reverts attention to the intimate and intricate relation between *jus ad bello* and *jus post bellum*. What duties of postwar justice arise, even under the tormented justificatory zodiac of preventive/preemptive war on terror? How may we read, in the contemporary circumstance, the law of belligerent/military occupation? How far may any distinctly Kantian reading of it thus remains legible under the current conjuncture?⁹⁵ At issue then are three difficult questions:

First, what obligations are there to restore the sovereignty of a conquered country and what limitations do these obligations impose on states' efforts to remake the governments of vanquished countries? Second, conversely, what are the rights and obligations that belligerent states retain in the political reconstruction of a defeated power? Are these rights limited to the reconstruction of genocidal regimes, or can a case be made for the political remaking of less dangerous dictatorships? Third, what obligations might victorious states have to restore the economy and infrastructure of a defeated state? And conversely, do victorious states have a right to demand some kind of reparation payments from defeated states who were aggressors in the concluded war?⁹⁶

⁹³ See e.g. Brilmayer, "Realism Revisited," *supra* note 70.

⁹⁴ Richard W. Miller offers some "larger lessons" that arise from Afghanistan and Iraq. See Richard W. Miller, "Terrorism, War, and Empire" in Sterba, *supra* note 10, 186. Any ethical justification of the "war on terror" entails a fine regard for "proportionality" in the use of force. Further, "responsibilities of trusteeship" provide the "rationale for a strong duty of aid" (*ibid.* at 201-02). The responsibility has to be fully understood in terms of aggravating past conduct. Miller thus maintains that this deepens the moral responsibility because, in both Afghanistan and Iraq, the United States "contributed to the deadly disorder by which it justifies its pursuit of suzerainty, by prior manipulation of fates in countries in which it now seeks enhanced control. The United States played an active role for decades in contributing to fanaticism in Muslim countries through support of fundamentalist groups reliably and ferociously opposed to the secular left, including the group that became Al Qaeda" (*ibid.* at 202).

⁹⁵ See James Turner Thompson, *Morality and Contemporary Warfare* (New Haven, Conn.: Yale University Press, 1999); Brian Orend, *War and International Justice: A Kantian Perspective* (Waterloo, Ont.: Wilfred Laurier University Press, 2000). Gary J. Bass, "Jus Post Bellum: Postwar Justice and Reconstruction" (2004) 32 Phil. & Pub. Aff. 384, resituates our reading of these texts in the present difficult moment.

⁹⁶ Bass, *ibid.* at 385.

These weighty questions ought to engage the TWAIL community's closest consideration given the complex and contradictory ethical and ideological justifications for preventive/preemptive wars on terror. At the very least, we all must engage with the maxim that erects "a presumption against any right of the victors to reconstruct a defeated country"⁹⁷ in terms of politics, economy, and culture. This task remains the more important because of the refractory effect of *jus post bellum* on the rationales of *jus ad bello*. Because space constraints forbid a detailed exploration here, all I may say is that the prose of international law of war, and of belligerent occupation, as this discourse was once upon a time named, now needs an anxious TWAIL revisitation.⁹⁸

VIII. IN LIEU OF A CONCLUSION

Both the "wars"—the war *of* and the war *on* terror—prefigure a "new" international law now in the making within the "circuits of nihilism." Some new forms of political nostalgia for a regime of unrestrained and unsanctioned use of force by states now stand presented. The horrible violence against the "war *of* terror" is now represented as constituting an abundant "jurisgenerative" repertoire of resources (to invoke Robert Cover's inestimable phrase).⁹⁹ But the performatives of the "war *on* terror" also violently remind us of what Cover also addressed as the "jurispathic," against which the "jurisgenerative" potential may be measured. Nostalgic recourse reminds us of the jurispathetic violence of the Old Cold War, which the New "Cold War" now repositions as justified imposition, yet all over again, of whole new eras of endless reproduction of human suffering and human rightlessness under the very banner and insignia of promoting alternate futures for the emergent "new" postcolonial and post-globalizing international law and human rights. Are these "creative" uses of nostalgia that reinvent the past necessary? How are these justified? The further question is whether they are sufficient unto the "evil of the day."

The epistemic TWAIL communities now stand summoned to the tasks of speaking to different futures than those hitherto signified, and even constituted, by the two terror "wars." Their tasks were poignantly and presciently anticipated by Albert Einstein (whose birth cenenary we now

⁹⁷ *Ibid.* at 396.

⁹⁸ In particular, I invite readers to David Luban's argumentative strategy that insightfully suggests that even as regards to "rogue" states, any morally defensible "general doctrine of preventive war" restricts justification and may "justify" its launching only by "the target of the threat, *not third parties*." See Luban, *supra* note 66 at 209 [emphasis added].

⁹⁹ See Robert M. Cover, "Foreword: *Nomos* and Narrative" (1983) 97 Harv. L. Rev. 4 at 40-44.

celebrate this year) who said towards the end of his life (and I quote this from memory, without any platitudinous benefit of a footnote sourcing) that "politics is harder than physics." I may here add that politics *for* human rights remains even harder than the politics *of* human rights now celebrated and calibrated in superabundance of some rank and gross consequential justifications offered by the perpetrators of the "war *on* terror."¹⁰⁰ How may the TWAIL communities fashion, Grotious-like, the new politics of human hope that reconstructs a new order of *temperamenta belli* amidst the two terror wars? One may only hope that these nascent communities may prove robust enough to survive this dire confrontation.

¹⁰⁰ See Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2002) for a further elaboration of these two forms of "politics."

